No. 32919-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LUIS GOMEZ-MONGES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR YAKIMA COUNTY

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER STATE CASES

STATUTES

RULES

A. ASSIGNMENTS OF ERROR

1. Mr. Gomez-Monges' right to due process was violated when the jury returned a guilty verdict, and the court entered a conviction, in the absence of sufficient evidence of first degree murder.

2. The elected prosecutor's *ex parte* letter impugning the integrity of the trial judge and seeking her recusal violated the separation of powers.

3. The elected prosecutor's *ex parte* letter constituted outrageous prosecutorial misconduct violating Mr. Gomez-Monges' right to due process and right to a fair trial.

4. The trial court erred in failing to dismiss the matter pursuant to CrR 8.3(b) due to outrageous governmental misconduct.

5. The trial court imposed discretionary legal financial obligations in the absence of a record that Mr. Gomez-Monges has the present or future ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the charged offense beyond a reasonable doubt. Mr. Gomez-Monges was charged with the premeditated murder of Vernon Holbrook yet there was a lack of evidence that he inflicted the fatal blows which killed Mr.

Holbrook or that he acted as an accomplice. Is Mr. Gomez-Monges entitled to reversal of the conviction with instruction to dismiss?

2. The separation of powers doctrine guarantees the equality of each of the three branches of government. One branch cannot encroach on another's power without violating the separation of powers doctrine. Elected Yakima Prosecutor James Hagerty's *ex parte* letter to the presiding superior court judge seeking the recusal of the trial judge violated the separation of powers doctrine. Did the trial court err in failing to dismiss the matter for a violation of the separation of powers doctrine?

3. Prosecutor Hagerty's *ex parte* letter constituted egregious prosecutorial misconduct and violated Mr. Gomez-Monges' right to due process. Did the trial court err in failing to dismiss the matter pursuant to CrR 8.3(b)?

4. Should this Court apply a structural error analysis to the prosecutorial misconduct committed by Prosecutor Hagarty requiring reversal and dismissal of Mr. Gomez-Monges' convictions, where the prejudice is impossible to quantify and Mr. Gomez-Monges would be denied a remedy?

4. Prior to imposing discretionary legal financial obligations (LFOs), the trial court must engage in an individualized inquiry into the defendant's present and future ability to pay these costs. The trial court imposed upon Mr. Gomez-Monges the costs of his incarceration without engaging in an individualized inquiry into his present and future ability to pay these costs. Is Mr. Gomez-Monges entitled to remand for resentencing to give the trial an opportunity to engage in the required inquiry?

C. STATEMENT OF THE CASE

Vernon Holbrook was the owner and broker for Aspen Real Estate in Yakima. RP 1446. Mr. Holbrook had owned Aspen for 40 years and was said to be the top real estate agent in the Yakima Valley. RP 1446, 1995-96.

At some point, Mr. Holbrook hired Daniel Blizzard as an agent. RP 1499. In September 2008, Mr. Holbrook sold Aspen to Mr. Blizzard and Mr. Blizzard's two brothers. RP 1499-500. Mr. Holbrook stayed on at Aspen as the designated broker, which was a State requirement. RP 1501.

The sale never came to fruition due to the Blizzards' failure to make the required payments, and in January 2010, Mr. Holbrook

rescinded the sales agreement and took the business back from the Blizzards. RP 1502. Mr. Holbrook also terminated Mr. Blizzard's employment at Aspen. RP 1506.

Mr. Blizzard was angry about Mr. Holbrook's rescission of the sale agreement and told close friends that he would pay $10,000 to anyone who killed Mr. Holbrook. RP 1960.

In December 2012, Mr. Blizzard was introduced to Adriana Mendez. RP 2225. Ms. Mendez became good friends with Mr. Blizzard and Mr. Blizzard helped Ms. Mendez with her rent and utilities payments. RP 2051-52. Mr. Blizzard and Ms. Mendez talked and texted each other incessantly. RP 2052.

Ms. Mendez was in a romantic relationship with Mr. Gomez-Monges, who she met in 2007. RP 2047. In February 2013, Ms. Mendez introduced Mr. Gomez-Monges to Mr. Blizzard. RP 2054. Ms. Mendez was aware that Mr. Blizzard was offering $10,000 to anyone who promised to kill Mr. Holbrook. RP 2054, 2237. Ms. Mendez approached Mr. Blizzard about the $10,000. RP 2056-57. Mr. Gomez-Monges was present during this discussion. RP 2057. Mr. Gomez-Monges does not speak English, but Ms. Mendez alleged that she interpreted Mr. Blizzard's offer to Mr. Gomez-Monges. RP 2057.

According to Ms. Mendez, Mr. Gomez-Monges agreed to do the killing. RP 2057.

Mr. Blizzard began to pester Ms. Mendez about when Mr. Gomez-Monges would kill Mr. Holbrook. RP 2058-60. In his discussions with Ms. Mendez, Mr. Blizzard offered a bonus on top of the $10,000. RP 2062. Mr. Blizzard told Ms. Mendez he would only pay the money once there was proof Mr. Holbrook was dead. RP 2064. Mr. Blizzard showed Ms. Mendez the $10,000 in an envelope. RP 2065.

Two weeks before the assault, Mr. Blizzard proposed a method for setting Mr. Holbrook up. RP 2061, 2064. The plan was for Ms. Mendez, posing as a potential buyer, to make an appointment with Mr. Holbrook to see a house. RP 2065. Mr. Blizzard and Ms. Mendez looked at the listings and chose a house in Tieton that was sufficiently isolated. RP 2064-66. Mr. Gomez-Monges was present during this discussion and Ms. Mendez alleged she interpreted the details to him. RP 2064-65. Mr. Blizzard gave Mr. Holbrook's phone number to Ms. Mendez, and she scheduled an appointment with him. RP 2066-67.

Mr. Gomez-Monges and Ms. Mendez met with Mr. Holbrook as scheduled. RP 2072. After viewing the house, Mr. Holbrook suggested

another house. RP 2073. Ms. Mendez and Mr. Gomez-Monges followed Mr. Holbrook to this house. RP 2074. According to Ms. Mendez, while she and Mr. Gomez-Monges were looking at the bedroom, she saw Mr. Gomez-Monges cock his left hand into a fist and swing at Mr. Holbrook. RP 2079. She turned to walk out of the room and felt Mr. Holbrook hit the floor. RP 2080. Ms. Mendez said she looked back and saw Mr. Gomez-Monges striking Mr. Holbrook several times in the head. RP 2081. She left when she claimed she saw blood. RP 2082.

Mr. Gomez-Monges stated that when he, Ms. Mendez and Mr. Holbrook arrived at the second house, Ms. Mendez entered the house with Mr. Holbrook. 10/9/2015RP 151-53. Mr. Gomez-Monges heard a sound he described as breaking coconuts and went into the house to observe Ms. Mendez standing over Mr. Holbrook hitting him in the head with a rock. 10/9/2015RP 155. Mr. Gomez-Monges grabbed Ms. Mendez and escorted her out of the house. 10/9/2015RP 155. The two drove back into Yakima. 10/9/2015RP 156.

Mr. Holbrook was discovered in the house suffering from head and neck injuries. RP 1327, 1370-73. He was diagnosed as having a depressed skull fracture with resulting brain damage, and a lacerated

neck. RP 1457-60, 1479. Mr. Holbrook never recovered and died on January 26, 2014. RP 1451.

Mr. Gomez-Monges was subsequently charged with first degree murder while armed with a deadly weapon. CP 29-30.[1] The State also alleged Mr. Holbrook was particularly vulnerable and the murder exhibited deliberate cruelty. *Id.*

Prior to the court's decision on co-defendants' motion regarding police searches for cellphone information, the elected prosecutor, James Hagarty, sent an *ex parte* letter to the presiding judge seeking the trial judge's removal and reassignment of the case. CP 337-41. The letter accused the trial judge of personal bias against Mr. Hagarty and other prosecutors in his office, and specifically referenced the Holbrook case. CP 338-41. The letter ended by seeking:

> I am requesting that Judge Reukauf recuse herself from the pending cases involved in the Vern Holbrook murder, and any other pending homicide case, or that you as

[1] Daniel Blizzard, Ms. Mendez, and another were charged with the same offenses. The matters were severed and, after a jury trial, Mr. Blizzard was convicted as charged. His conviction was subsequently affirmed by this Court. *State v. Blizzard*, 195 Wn.App. 717, 724, 381 P.3d 1241 (2016), *review denied*, 187 Wn.2d 1012 (2017).

Ms. Mendez pleaded guilty to second degree assault and rendering criminal assistance and was sentenced to credit for the time she already served in return for her testimony. RP 2152, 2172. All charges were dismissed against the other person. RP 2296.

> Chief Judge remove her from these cases in the interest of fairness and justice, and because of a clear and pervasive bias and prejudice against my office. While I suspect my request will fall on deaf ears and there will be some retribution for this letter against my office, I hope that the Yakima County Superior Court will take these matters seriously and strongly consider our request in the interest of justice and fairness.

CP 341.

In response, Mr. Gomez-Monges moved to dismiss the matter pursuant to CrR 8.3(b) CP 355-62. The prosecutor assigned to this matter abandoned the motion for recusal made by Prosecutor Hagarty. CP 353-54. The trial court, after much consideration, denied the motion. Initially, the court rejected the State's argument that Mr. Hagarty's letter did not constitute prosecutorial misconduct:

> I want to make this record abundantly clear that Mr. Hagarty's letter constitutes prosecutorial misconduct. There is absolutely no doubt that this was an ex parte communication with the trial judge in a pending matter that is prohibited by the Rules of Professional Conduct, 3.5. For the state to suggest otherwise is, worst case scenario, disingenuous or, best case scenario, naive.

RP 566. The court then ruled:

> Because I cannot find that this rises to structural error, this behavior, and because I believe it is premature to assess any actual prejudice as to the defendants' ability to receive a fair trial in this county, and as I've stated I don't believe I can make an assessment of that until we actually get into the jury selection process, I am denying the motions to dismiss in this matter for prosecutorial

> misconduct and will address the other issues if they become ripe.

RP 575-76.[2]

The matter proceeded to trial and in addition to the standard jury instructions, the jury was instructed on accomplice liability. CP 1846. The jury convicted Mr. Gomez-Monges of first degree murder, but the jury refused to find that he was armed with a deadly weapon, and refused to find the aggravating factors that Mr. Holbrook was particularly vulnerable or that the murder manifested deliberate cruelty. CP 1864-67.

At sentencing, in imposing legal financial obligations (LFOs), the trial court found Mr. Gomez-Monges had an ability to pay:

> For those amounts today, my determination, Mr. Gomez-Monges, is whether you have an ability to pay those amounts. Certainly based upon the testimony during trial, although not consistently employed, certainly at times you were employed. There was nothing through trial that was brought to the court's attention or today that you do not have an ability to work. So I am imposing those amounts, taking into account you have an ability to pay on those amounts for those reasons.

RP 2364-65. The court went to address the imposition of the cost of incarceration, a discretionary LFO:

---

[2] On April 29, 2015, Mr. Hagarty was admonished by the Washington State Bar for his conduct. *See* https://mcle.mywsba.org/disciplinefiles/1919/0021.pdf.

> Under section 4.D.4, the costs of incarceration, that's a bit different. The costs of incarceration are determined taking into account your ability right now on the spot today to pay. I'm finding those to be very limited. In fact, I find those to be more limited than Mr. Blizzard. I am capping those costs at $500. I capped his at $1,000.

RP 2365.

D. ARGUMENT

1. There was insufficient evidence Mr. Gomez-Monges was guilty of first degree murder.

a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable

inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. *There was insufficient evidence Mr. Gomez-Monges killed Mr. Holbrook.*

To establish the first degree premeditated murder of Mr. Holbrook, the State was required to prove that Mr. Gomez-Monges acted with premeditated intent to cause the death of another and that the defendant actually caused the death of that person or a third person. RCW 9A.32.030(1).

The injuries that resulted in Mr. Holbrook's ultimate demise were the fractured skull and lacerated neck. According to the State's theory, Mr. Gomez-Monges killed Mr. Holbrook, but the manner of his death belies that claim. There simply was no evidence Mr. Gomez-Monges killed Mr. Holbrook.

It is important to remember the jury refused to find that Mr. Gomez-Monges was armed with a deadly weapon. CP 1865. Both Dr. Reynolds, the State's pathologist, and Dr. Wigren, retained by Mr. Gomez-Monges, agreed that the injury to Mr. Holbrook's neck was caused by a sharp object; Dr. Reynolds claimed it could have been a box cutter, Dr. Wigren opined it was a sharp knife but unlikely a box cutter. RP 2368.

> My sense is it probably wasn't that. It was probably some other sharp force like a knife, like a kitchen knife. It could even be a steak knife. It had to be something that would be able to get in deep enough. I think Dr. Reynolds said two inches for the blade. I just feel like if that box cutter been extended to two inches, it probably would have broken off at the base. That would be my sense.

Id. (Testimony of Dr. Wigren).

In addition, a box cutter seized at the scene of Mr. Holbrook's assault was tested for DNA which showed a mixed profile from at least three individuals. RP 1745.

Since the jury rejected the allegation that Mr. Gomez-Monges was armed, plus the fact Ms. Mendez did not see Mr. Gomes-Monges with a deadly weapon, there was no evidence or finding that he caused the injury to Mr. Holbrook's neck.

Regarding the skull fracture, both doctors rejected the State's theory that Mr. Gomez-Monges caused it using his fist, the only act Ms. Mendez claimed she saw Mr. Gomez-Monges engaged in. Dr. Reynolds went to so far as to say anyone using their hand to attempt such a result would have broken every bone in their hand. RP 2338. Mr. Gomez-Monges neither had broken hand nor any injury to his hand.

Dr. Wigren concurred in this assessment, noting the injuries were caused by something "more consistent with an edge of a piece of wood, a two-by-four or even the edge of a brick, maybe even a rock." RP 2358. This was also consistent with the assessment of Dr. Padilla, the emergency room doctor who first saw Mr. Holbrook. RP 1456-57. He opined that the skull fracture could have been caused by "[a] numerous number of blunt items, hard objects, butt of a gun, brick, stones, something large blunt object likely." RP 1457.

Further, Dr. Wigren rejected the theory that the skull fracture could have been caused by someone stomping on Mr. Holbrook's head:

> If it was stomping it would have to be a really hard-edged sole. It couldn't be like your sneaker, which has kind of a rubberized, a compressible type of sole. It would have to be almost like a boot edge but not rubber. It would have to be like leather or even a metal edge.
>
> The other thing that's missing is a patterned abrasion. Usually when you're stomping on someone, if you look at the sole of your shoes, there's a pattern to it like there is on my shoe. If I were to stomp on someone's head, you're going to see an abrasion typically nearby that has kind of this pattern along with it. That usually -- a surgeon would probably remark on that and a forensic nurse examiner would probably photograph that.
>
> So I don't think it was -- I don't think it was a shoe or a stomping. I have seen stompings, and they usually have some sort of patterned abrasion with them.

> Q. Basically if somebody gets stomped on the head they're going to have a shoe print on the side of their head?
>
> A. Yes.
>
> Q. Is that oversimplifying?
>
> A. No, that's true. Yes.
>
> Q. Okay. You didn't see any shoe prints on Mr. Holbrook?
>
> A. I did not.

RP 2370-71.

Finally, the State in its closing argument could point to nothing specific that caused the blunt force trauma, only that Mr. Holbrook had suffered from it.

> That's where Mr. Holbrook was brutally and viciously attacked. But who did that to him? That's where you heard from Adriana Mendez, it was the Defendant in this case, Luis Gomez-Monges . . . And what happens at that point? Ms. Mendez said, "Out of the corner of my eye, I saw Luis basically cock his hand back, his left hand." It's in a fist. And then she sees Luis hit Mr. Holbrook in the back of the head and he didn't even see it coming. Mr. Holbrook goes down.
> . . .
>
> She did say she saw Luis punch Mr. Holbrook in the head about four or five times. *Okay, we never said the injuries were caused by his hands.* We asked Dr. Reynolds about that, whether or not that was possible. He and Dr. Wingrun [sic] agreed no, because if someone did that, it would break their hand. *We don't know any*

> *reason or don't have anything to show that Luis, that either of his hands were broken.*
> . . .
>
> You didn't hear testimony from the doctors though that Mr. Holbrook' injuries to his head, these lacerations, were pokes, they were lacerations, long cuts. *Well, what could have happened? We don't know that part*.

10/9/2014RP 248, 298 (emphasis added).

Further, the State could point to nothing in the record that Mr. Gomez-Monges used a knife, seeming to rely on the orange box cutter but acknowledged there was insufficient DNA to point to one person but that Mr. Gomez-Monges, Ms. Mendez and Mr. Blizzard could not be excluded. This was hardly substantial evidence to support a verdict that Mr. Gomez-Monges was the principal in killing Mr. Holbrook.

The State provided evidence *ad nauseum* of a plan by Mr. Blizzard to kill Mr. Holbrook. The State proved that Mr. Gomez-Monges had knowledge of this plan, was present when Mr. Holbrook was killed, but there was no evidence that Mr. Gomez-Monges killed Mr. Holbrook. The State had no murder weapon or specific method for inflicting the injuries. The State did not have a murder weapon or any idea how the fatal injuries were inflicted. The State simply pointed at Mr. Gomez-Monges and said he must have done it. But "must have done it" is not the same as proof beyond a reasonable doubt.

c. *There was insufficient evidence Mr. Gomez-Monges acted as an accomplice to Ms. Mendez's act of killing Mr. Holbrook.*

As an alternative theory, the State alleged Mr. Gomez-Monges was an accomplice to Ms. Mendez's killing Mr. Holbrook. The jury was instructed on accomplice liability. CP 1846. This argument fares no better than the State's theory that Mr. Gomez-Monges was the principal. The evidence showed he had knowledge and was present when the killing took place, but there was no evidence he was ready to assist Ms. Mendez or committed an overt act in furtherance of killing Mr. Holbrook.

An accomplice is guilty to the same extent as the principal. RCW 9A.08.020(1)-(2). Accomplice liability is an *alternative theory* of liability requiring a jury to reach different findings than it would if it were determining liability as a principal. RCW 9A.08.020(3) (defining elements of accomplice liability); *State v. Brown*, 147 Wn.2d 330, 352, 58 P.3d 889 (2002).

An accomplice is someone who, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he ... aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3). Presence and knowledge are not enough; the accomplice

must associate himself with the crime charged, participate in it, and seek to make it succeed. *State v. Amezola,* 49 Wn.App. 78, 89, 741 P.2d 1024 (1987). An accomplice is not strictly liable for all acts arising from the initial crime in which he participated unless he associates himself with those acts. *State v. Roberts,* 142 Wn.2d 471, 512, 14 P.3d 713 (2000). Accomplice liability requires an overt act. *State v. McCreven*, 170 Wn.App. 444, 477, 284 P.3d 793 (2012); *State v. Matthews,* 28 Wn.App. 198, 203, 624 P.2d 720 (1981).

For accomplice liability to attach there must be evidence that the accomplice did something in association with the principal to accomplish the crime. *State v. Boast,* 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976); *State v. Murray,* 10 Wn.App. 23, 28, 516 P.2d 517 (1973). The person giving aid must participate in the crime charged "as something he wishes to bring about, and by action to make it succeed." *Boast,* 87 Wn.2d at 456. "Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient; the State must prove that the defendant was *ready to assist* in the crime." *State v. Luna,* 71 Wn.App. 755, 759, 862 P.2d 620 (1993) (emphasis added).

Thus, to prove Mr. Gomez-Monges was an accomplice, the State had to prove beyond a reasonable doubt that he (1) knew his

actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. RCW 9A.08.020(3). Taking the evidence in the light most favorable to the State, although there was evidence that Mr. Gomez-Monges was present at the house where Mr. Holbrook was killed, that he drove with Ms. Mendez to the house, and that he was aware that Ms. Mendez was going to kill Mr. Holbrook, the evidence failed to show that.

In order to find Mr. Gomez-Monges was an accomplice to Ms. Mendez, the jury would have had to reject her version of the events. Thus, according to Mr. Gomez-Monges' testimony, he drove with Ms. Mendez to the house in Tieton where Ms. Mendez met with Mr. Holbrook. 10/9/2015RP 150-51. While waiting in the car with Ms. Mendez's children, he heard a sound like breaking a coconut. 10/9/2015RP 154. He went inside the house to investigate and saw Ms. Mendez standing over Mr. Holbrook hitting him with a rock in the head. 10/9/2015RP 155. He took the rock away from Ms. Mendez and they left and drove back to Yakima. 10/9/2015RP 155-56.

Even looking at this evidence in the light most favorable to the State, there is insufficient evidence that Mr. Gomez-Monges acted as

an accomplice. While it was arguably the case that he knew of the plan and was present when Ms. Mendez struck the fatal blows; he was in the car when those blows were struck, thus he did not engage in any conduct which encouraged or assisted Ms. Mendez nor was he ready to assist. At best, Mr. Gomez-Monges was guilty of rendering criminal assistance for taking the murder weapon from Ms. Mendez and escorting her from the home.

d. *Mr. Gomez-Monges' conviction must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the conviction, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford,* 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States,* 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. Prosecutor Hagarty's inflammatory and unethical letter to the trial judge must result in reversal of Mr. Gomez-Monges' conviction.

a. *The letter violated the Separation of Powers Doctrine.*

The separation of powers doctrine is not specifically enunciated in either the Washington or federal constitutions, but is universally recognized as deriving from the tripartite system of government established in both constitutions. *See, e.g.,* U.S. Const. arts. I, II, and III (defining legislative, executive, and judicial branches); Const. arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997); *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). The doctrine of separation of powers divides the political power into three co-equal branches of government. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). "The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate." *Carrick,* 125 Wn.2d at 135. The "concept of separation of powers" is exemplified by "the very structure of the Constitution." *Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (internal quotation marks omitted).

Executive actions which contravene the principle of separation of powers are unconstitutional. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-46, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Buckley v. Valeo*, 424 U.S. 1, 118-24, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). The Supreme Court has placed it beyond dispute that the doctrine of separation of powers is vital for constitutional government. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. at 441-46.

When separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. *See Carrick*, 125 Wn.2d at 135 n. 1. However, this court relies on federal principles regarding the separation of powers doctrine in interpreting and applying the state's separation of powers doctrine. *Blilie*, 132 Wn.2d at 489; *Carrick*, 125 Wn.2d at 135 n. 1.

Here, Prosecutor Hagerty's *ex parte* letter violated the separation of powers doctrine. "If without cause shown a judge could be removed at the whim of the Commonwealth, based solely on

allegations contained in the petition, the purpose of an independent judiciary would be frustrated." *Com. v. McAndrew*, 361 Pa. Super. 60, 64, 521 A.2d 472, 474 (1987).

> Indeed, if appearances were gauged without reference to the full and true facts, then false appearances of impropriety could be manufactured with ease by anyone with personal or political *animus* toward a judge. If such were the case, then the hope of an independent judiciary would have been less than an evanescent dream, it would have been cruel charade and a dangerous snare for an ethical and unsuspecting judiciary.

In re Neely, 2017 WY 25, 108, 390 P.3d 728, 759 (Wyo. 2017).

Here, Prosecutor Hagerty attempted to use his office, and the power of the Executive branch, to remove Judge Reukauf from this case solely on his false perception of her inability to be fair to the State. Prosecutor Hagerty's actions violated the separation of powers doctrine.

b. *The prosecutor's letter constituted outrageous government conduct thereby violating Mr. Gomez-Monges' right to due process and a fair trial, and requiring that his CrR 8.3 motion be granted.*

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976);

State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct deprives a defendant of the constitutionally right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984).

In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, *i.e.*, did the misconduct prejudice the jury thereby denying the defendant a fair trial? *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the petitioner's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

CrR 8.3(b) reads, in relevant part:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

"Fairness to the defendant underlies the purpose of CrR 8.3(b)." *State v. Koerber,* 85 Wn.App. 1, 3, 931 P.2d 904 (1996).

The trial court here found Prosecutor Hagarty's actions constituted prosecutorial misconduct; a finding not disputed by the State. In addition, Prosecutor Hagarty's actions arguably constituted a crime:

Under RCW 9A.72.160:

> (1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.

"[T]he legislative intent behind RCW 9A.72.160(1) is to protect judges from the threat of harm [ ] by retaliatory acts because of past official actions...." *State v. Hansen,* 122 Wn.2d 712, 717, 862 P.2d 117 (1993).

This is precisely what Prosecutor Hagarty was attempting to do; either retaliate against Judge Reukauf or influence her rulings based

solely on his perception of Judge Reukauf's past rulings. Prosecutor Hagerty's actions were grossly improper and constituted outrageous governmental misconduct.

c. *The egregious prosecutorial misconduct found in Prosecutor Hagarty's letter constituted structural error and compels reversal and remand for a new trial.*

Only those errors that are "structural" require automatic reversal. *Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Structural error is a special category of constitutional error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Where there is structural error "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id, quoting Rose v. Clark,* 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citation omitted). Once there is a finding that a structural error occurred, prejudice is presumed and the remedy is remand for a new trial. *In re Pers. Restraint of Orange,* 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This is because a structural error

"resists" a harmless error analysis as "it taints the entire proceeding." *State v. Levy,* 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Put another way, structural errors "infect the entire trial process." *Neder,* 527 U.S. at 8, *Brecht v. Abrahamson,* 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Structural errors are said to "defy" harmless error review because they "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.'" *Neder,* 527 U.S. at 8-9 (alteration in original), *quoting Clark,* 478 U.S. at 577-78.

The United States Supreme Court has suggested that prosecutorial misconduct could be considered structural error:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller,* 483 U.S. 756, 769, 107 S.Ct. 3102, 3110, 97 L.Ed.2d 618 (1987) (Stevens, J., concurring in judgment).

Brecht, 507 U.S. 638 n.9

Separation of powers and denial of a fair trial traditionally have required a finding of prejudice. But, this case presents a scenario suggested by the *Brecht* Court, where the injury or harm to Mr. Gomez-Monges caused by the prosecutor's misdeed cannot be assessed or quantified. Finding structural error here is the best way to provide a remedy and deter this type of conduct by prosecutors. It is impossible to determine if the trial judge was affected by the letter, and if so, to what extent. In addition, the letter amounted to an attack on the integrity of the judicial system itself. There are procedures in place to seek a judge's recusal, but instead, the elected prosecutor decided to deliver an intimidating letter that questioned the neutrality of the trial judge. This Court cannot allow this conduct to go unpunished. Applying structural error to this misconduct will be the only way to deter this conduct in the future.

As a consequence, this Court must reverse Mr. Gomez-Monges' conviction and order the matter dismissed.

3. **The trial court erred in imposing discretionary costs without making an individualized inquiry into Mr. Gomez-Monges' ability to pay.**

a. *The court may impose court costs and fees only after a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." The record must reflect that the superior court conducted an individualized inquiry into the defendant's present and future ability to pay such obligations, as required by RCW 10.01.160(3).

In *State v. Blazina,* 182 Wn.2d 827, 838, 344 P.3d 680 (2015), the Washington Supreme Court clarified that RCW 10.01.160(3) requires the trial court "do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required

inquiry." Rather, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Id,* at 838. This inquiry includes evaluating a defendant's financial resources, incarceration, and other debts, including restitution, *Id,* at 838-39.

In addition, "[c]ourts should also look to the comment in court rule GR 34 for guidance." *Id*.

> This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.,* if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id.

The record in this case reflects no such inquiry at the sentencing hearing, and the judgment and sentence form contains only boilerplate findings of an ability to pay, which is simply inadequate. *Blazina*, at 838.

b. *The court failed to make the individualized inquiry here before imposing attorney fee recoupment and costs of incarceration.*

RCW 9.94A.760(2) provides that the trial court may require an offender to pay costs of incarceration "[i]f the court determines that the offender, at the time of sentencing, has the means to pay." The record here fails to reflect an inquiry at the sentencing hearing into Mr. Gomez-Monges' ability to pay consistent with *Blazina* and RCW 10.01.160(3). The record shows no inquiry by the trial court into Mr. Gomez-Monges' past or future financial capability consistent with GR 34. He is a currently an incarcerated indigent defendant, both characteristics about which the Supreme Court instructed trial courts include in their inquiry under RCW 10.01.160(3). *Blazina*, 182 Wn.2d at 838-39.

c. *The remedy for the court's failure to inquire into Mr. Gomez-Monges' financial circumstances and make a finding of his ability to pay is remand.*

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 182 Wn.2d at 839.

The Court reached the issue in *Blazina* because of ample and increasing evidence that unpayable LFOs "imposed against indigent defendants" imposed significant burdens on offenders and our community, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835-87 (citing extensive sources). Thus, consistent with the opinion in *Blazina* and our other cases decided since then, this Court should remand to the trial court for resentencing with proper consideration of Mr. Gomez-Monges ability to pay the discretionary costs. *State v. Duncan*, 180 Wn.App. 245, 249-50, 327 P.3d 699 (2014), *aff'd and remanded*, 185 Wn.2d 430, 374 P.3d 83 (2016).

E. CONCLUSION

For the reasons stated, Mr. Gomez-Monges asks this Court to reverse his conviction with instructions to dismiss. Alternatively, Mr. Gomez-Monges asks the Court to remand for resentencing for the trial court to strike the discretionary costs.

DATED this 25th day of August 2017.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
1511 Third Avenue, Suite 701
Seattle, WA. 98101
(206) 587-2711
Fax (206) 587-2710
tom@washapp.org
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. LUIS GOMEZ-MONGES, Appellant.	)))))))))	NO. 32919-4-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID TREFRY [David.Trefry@co.yakima.wa.us] YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] LUIS GOMEZ-MONGES 378372 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF AUGUST, 2017.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

August 25, 2017 - 4:28 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	32919-4
Appellate Court Case Title:	State of Washington v. Luis Gomez-Monges
Superior Court Case Number:	13-1-00805-5

The following documents have been uploaded:

- 329194_Briefs_20170825162642D3448419_0511.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was washapp.org_20170825_161536.pdf

A copy of the uploaded files will be sent to:

- David.Trefry@co.yakima.wa.us
- greg@washapp.org
- joseph.brusic@co.yakima.wa.us
- tamara.hanlon@co.yakima.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170825162642D3448419